Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

WILLIAM STEPHEN HALL,

Petitioner,

vs.

L.W. OWEN AND CAPTAIN BUSH,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM S. HALL, D.C. No. 122626
Pro Se
WILLIAM STEPHEN HALL
Okeechobee Correctional Inst.
P.O. Box 1984
Okeechobee, Florida 34973

4788

QUESTION PRESENTED

Is the Sep. 2, 1998 Judgment by the United States Court of Appeal's Affirming the United States District Court Adoption of the Magistrate Judge May 8th 1997 Report And Recommendation Granting the Defendant's Motion For Summary Judgment Correct in Law and Fact in Accordance with Federal Law and U.S. Supreme Court Precedent?

PARTIES

The petitioner below was William Stephen Hall, an inmate in the Florida Department of Corrections.

The respondents below were L.W. Owen and Captain Bush, of the Florida Department of Corrections.

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PETITION FOR WRIT OF CERTIORARI

William Stephen Hall, is an inmate within the Florida Department of Corrections, and respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit (App. 1) and the district court (App. 5) are unpublished.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Article III, Section 2, of the U.S. Constitution and 28 U.S.C. § 1254. The opinion of the U.S. Court of Appeals for the Eleventh Circuit was issued on September 2, 1998.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutory provision believed to confer on this Court's jurisdiction by writ of certiorari is 38 U.S.C.S. 7292(c), 28 U.S.C. § 2101(E). This involves the First, Fourth, Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

STATEMENT OF THE CASE

The United States District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and the United States Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Thus on Nov. 12th 1995 petitioner was seized by force and removed form my administrative custody cell by defendant's Sgt. L.W. Owen and Captain Bush in restraints with my hands cuffed behind my back, and I was wearing no clothing other than my boxer shorts and petition was placed in a 4' by 6' shower stall and the door was locked and L.W. Owen sprayed mace gas in my eyes and all over my body for about "8" to "9" seconds. Thus I was sprayed with "19.6" grams of Mark IV Pepper Mace because of my verbal grievance. Thus all my personal property was seized for about "35" hours and returned and my mattress, blankets, and linen was seized for "8" or more days. Thus on Nov. 1st 1995 Petitioner filed a Civil Rights Complaint in the U.S. Dist. Ct. Thus on Jan. 22nd 1996 U.S. Magis. Judge Susan M. Novotny ordered the complaint to be served upon the defendants. Thus on Mar. 29th 1996 defendants filed a response of Motion To Dismiss or in the alternative for summary judgment. Thus Petitioner filed "3" notice in opposition to the Motion To Dismiss on April 8th, 14th and 21st 1996. Thus on May 8th 1997 Magis. Judge Miles Davis issued a report recommending defendant's Motion For Summary Judgment be granted thus Petitioner file an objection on May 20th 1997. Thus on June 2nd 1997 the Dist. Court adopted the report and recommendation as the opinion of the court. Thus Petitioner filed Notice Of Appeal on June 18th 1997. Thus on Feb. 11th 1998 and Oct. 1st 1998 Petitioner conveyed motion for injunctive relief to the

U.S. Court Of Appeals. Thus on Sep. 2nd 1998 the U.S. Court Of Appeals issued it's judgment and it's mandate on Oct. 5th 1998.

ARGUMENT

Thus the opinion and judgment of the U.S. Court Of Appeals is an obvious abuse of discretion and plain error and contrary to federal law and U.S. Supreme Court precedent and decisions in the following cases. *Whitley v. Albers*, 475 U.S 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986). *Hudson v. McMillian*, 112 S.Ct. 995, 1000 (1992). *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981). *Wilson v. Seiter*, 501 U.S. 294, 111 S.Ct. 2321, 2326-27, 115 L.Ed.2d 271 (1991). *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). And therefore I pray for writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted. The judgment of the court of appeal should be vacated, and case remanded with instructions to address the merits of the petitioner's claims.

Respectfully submitted,

William Stephen Hall, 122626
Okeechobee Corr. Inst.
P.O. Box 1984
Okeechobee, Florida 34973

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United States Court of Appeals
For the Eleventh Circuit

No. 97-2770
Non-Argument Calendar

District Court Docket No. 95-30539

WILLIAM STEPHEN HALL,

Plaintiff-Appellant,

versus

L.W. OWEN, CAPTAIN BUSH,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

Before EDMONDSON, BIRCH and MARCUS, Circuit Judges.

JUDGMENT

(Filed Sep. 02, 1998)

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the District Court in this cause be and the same is hereby AFFIRMED.

Entered: September 2, 1998

For the Court: Thomas K. Kahn, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: OCT 5, 1998

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2770
Non-Argument Calendar

D. C. Docket No. 95-30539/LAC

WILLIAM STEPHEN HALL,

Plaintiff-Appellant,

versus

L.W. OWEN,
CAPTAIN BUSH,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(September 2, 1998)

Before EDMONSTON, BIRCH and MARCUS, Circuit Judges.

PER CURIAM:

William Stephen Hall, a *pro se* Florida inmate, appeals the grant of summary judgment for L.W. Owen and Captain Bush, corrections officers, in his civil-rights action, 42 U.S.C. § 1983.

These issues were presented*:

(1) consideration of defendants' affidavits; and

(2) propriety of summary judgment based on qualified immunity and failure to state constitutional claims on

(a) excessive force through use of pepper mace

(b) eight-day deprivation of mattress

(c) fraudulent disciplinary report.

The district court properly considered the defendants' affidavits. And no genuine issue of material fact was shown for Hall's claims that (a) the defendants' use of pepper spray on him constituted excessive force; (b) qualified immunity did not apply to the removal of his mattress under a constituted cruel and unusual punishment theory; and (c) the defendants filed a fraudulent disciplinary report against him. We affirm.

AFFIRMED.

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*Further, Hall complains for the first time on appeal that the defendants penalized him for exercising his First Amendment right to make verbal grievances, and that their use of force against him had a chilling effect on other prisoners' exercise of free speech. Because Hall did not pursue these claims in the district court, we will not consider them on appeal. *Cf. Narey v. Dean* 32 F.3d 1521, 1526-27 (11th Cir. 1994) (noting general rule against consideration of issues raised newly on appeal and setting forth exceptions).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

WILLIAM STEPHEN HALL,
Plaintiff,

vs. PCA 95-30539/LAC/MD

L.W. OWEN and
CAPTAIN BUSH,
Defendants.

ORDER

Upon consideration of the Report and Recommendation of the Magistrate Judge filed on May 8, 1997, pursuant to 28 U.S.C. § 636(b)(1)(B), and after reviewing objections to the Recommendation, if any, the Recommendation is adopted as the opinion of the Court.

Defendant's motion for summary judgment is GRANTED and this case is DISMISSED.

DONE AND ORDERED this 2nd day of June, 1997.

/s/ Lacey A. Collier
LACEY A. COLLIER
UNITED STATES DISTRICT
JUDGE

6-3-97 Illegible
Illegible Hall & Lord

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

WILLIAM STEPHEN HALL

Plaintiff

vs. CASE NO. 95-30539/LAC

L.W. OWEN, Et. Al.,

Defendants

Notice of objection and opposition to the magistrate judge May 8th 1997, report and recommendation to grant the March 29th 1996, motion to dismiss by defendant's attorney on all facts and evidence and statements made in plaintiff's November 19th 1995, pro se complaint and all statements made in documents affixed to plaintiff's "3" three notice in opposition to dismiss, of April 8th 1996, April 14th 1996, and April 21st 1996, and also all statements, facts and evidence presented to this court in plaintiff's "3" three supra notice in opposition to dismiss and all sworn statements of plaintiff's May 7th 1996, notice in opposition to dismiss pro se affidavit, and the facts and statements presented in plaintiff's "motion" of August 20th 1996, which Mr. Shannon C. Lord, attorney for defendants did not rebutt. Presently plaintiff is now about "800" miles from this court. Thus plaintiff respectfully request [sic] this district court not adopt the magistrate judge decision to grant defendants motion for summary judgment "Doc. 10". Thus plaintiff now for good cause resubmit [sic] that defendants are not legally entitled to a summary judgment as demonstrated by plaintiff over "13" thirteen months ago. Thus plaintiff

now renews all pro se documents in support of plaintiffs suit at bar, submitted to this instant court for consideration. Thus plaintiff respectfully request [sic] this case be set for trial with the intent of resolving this matter case sub judice by way trial by jury, out of court settlement or consent decree.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

WILLIAM STEPHEN
HALL,

Plaintiff,

PCA 95-30539/LAC

vs.

L.W. OWEN and
Captain BUSH,

Defendants.
_____/

REPORT AND RECOMMENDATION

This cause is before the court on a motion for summary judgment (doc. 10) filed by defendants in this case. Plaintiff has filed a response to the motion (docs. 12-14). This is an action under 42 U.S.C. § 1983, in which plaintiff alleges that defendants violated his Eighth Amendment right to be free from cruel and unusual punishment.

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Furthermore, a complete failure of proof concerning an essential element of plaintiffs case renders all other facts immaterial. *Id.* at 324. The movant can demonstrate that the plaintiffs evidence is insufficient to establish his case, or an essential element thereof, by either affirmatively

demonstrating the plaintiffs lack of evidence or by reviewing for the court the record to show such lack of evidence. *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554; *Hammer v. Slater*, 20 F.3d 1137, 1141 (11th Cir. 1994) (en banc). However, "it is never enough simply to state that the nonmoving party cannot meet its burden at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

Evidence presented in opposition to the motion for summary judgment, and all factual inferences arising from it, must be viewed in the light most favorable to plaintiff. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). However, the "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The "mere possibility that a factual dispute may exist, without more, is not sufficient to overcome a convincing presentation by the moving party". *Quinn v. Syracuse Model Neighborhood*, 613 F.2d 438, 445 (2nd Cir. 1980). Additionally, an inference of fact must be plausible before the non-moving party is entitled to it. *Brown v. City of Clewiston*, 848 F.2d 1534, 1541 (11th Cir. 1988). Only reasonable doubts should be resolved in favor of the party opposing the motion. *Earley v. Champion Intern. Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990).

To overcome a motion for summary judgment, the non-moving party must either point to evidence in the record or present additional factual evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency. *Celotex*, 477 U.S. at 324;

Hammer, 20 F.3d at 1141. The existence of a scintilla of evidence in support of the plaintiff's position is insufficient; the test is "whether there is [evidence] upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Anderson*, 106 S.Ct. at 2512. "If the evidence is merely colorable or not significantly probative, summary judgment may be granted." *Id.* at 2511.

Thus, mere verification of a party's own conclusory allegations is not sufficient to oppose a motion for summary judgment. *See* FED.R.CIV.P. 56(e); *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990); *Peppers v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989). It is insufficient merely "to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188, 111 L.Ed.2d 695 (1990). Courts should not presume "that general averments embrace the 'specific facts' needed to sustain the complaint." *Id.*

Defendants assert qualified immunity in their summary judgment motion. Qualified immunity shields government officials from suits against them in their individual capacities for those actions taken within the scope of their discretionary authority that do not violate a clearly established constitutional right of which a reasonable person would have known given the circumstances and information possessed by the official at the time of the conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In order to prevail on the motion, defendants must show that they are entitled to qualified immunity as a matter of law and that there are

no genuine issues of material fact pertinent to any relevant matter of law. *Rich v. Dollar,* 841 F.2d 1558, 1562 (11th Cir. 1988).

To establish qualified immunity, defendants bear the initial burden of showing that they were acting within the scope of their discretionary authority when the allegedly wrongful acts occurred; once this burden is met, the onus is then on the plaintiff to show that the defendants violated clearly established constitutional law. *Id.* at 1563-64 (quoting *Zeigler v. Jackson,* 716 F.2d 847, 849 (11th Cir. 1983). Plaintiff satisfies this burden by showing that (1) the laws or rights that were allegedly violated were clearly established at the time defendants acted, and (2) that there is at least a genuine issue of material fact as to whether the defendants actually committed the acts. *Id.* at 1563; *see also Johnson v. Clifton,* 74 F.3d 1087, 1091 (11th Cir. 1996).

In regard to the first burden, the plaintiff must show that the constitutional right was "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Edwards v. Gilbert,* 867 F.2d 1271, 1273 (11th Cir. 1989). Immunity should be granted if, at the time of the officer's actions, the law was unclear or the officer could have reasonably believed his actions were lawful. *Id.* Furthermore:

> For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that what he is doing violates federal law. Qualified immunity

> is a doctrine that focuses on the actual, on the specific, on the details of concrete cases.
>
> . . .
>
> [C]ourts must not permit plaintiffs to discharge their burden by referring to general rules and to the violation of abstract rights.
>
> . . .
>
> General propositions have little to do with the concept of qualified immunity. . . . The line is not to be found in abstractions – to act reasonably, to act with probable cause, and so forth – but in studying how these abstractions have been applied in concrete circumstances.
>
> The facts need not be the same as the facts of the immediate case. But they do need to be materially similar. Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases. For qualified immunity to be surrendered, preexisting law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.

Lassiter v. Alabama A&M University, 28 F.3d 1146, 1149-50 (11th Cir. 1994) (citations and quotations omitted).

Since it is uncontroverted and clear from the record that defendants acted within the scope of their authority at all times relevant to the complaint, *see Rich*, 841 F.2d at 1564, the next step is for the court to determine the applicable law at the time of the alleged violations.

At all times relevant to the complaint, plaintiff was an inmate at Okaloosa Correctional Institution where

defendants work as corrections officers. Plaintiff alleges that on November 12, 1995, after requesting that the heat in his close management cell be turned on and the "draw fan" turned off, defendant Officer Owen placed him in handcuffs and removed him from his cell. Apparently under the supervision and approval of defendant Officer Bush, plaintiff was then taken to a shower stall where Owen sprayed mace into his face, eyes and body for approximately 8 to 9 seconds. As a result, alleges plaintiff, he nearly "choked to death" and was effectively blinded for the next 25 minutes.

Plaintiff also alleges that his cell was stripped, depriving him of his clothing, bedding and legal materials, and forcing him to sleep on a bare steel bunk for 35 hours. Plaintiff alleges that his clothing was subsequently returned to him but that he did not receive a mattress until 8 days later.

Additionally, plaintiff states that a fraudulent disciplinary report was filed against him regarding the incident, the basis for the fraud being that defendant Owen did not mention in the report that he had used mace upon plaintiff. Finally, plaintiff states that the deprivation of his legal materials was in an effort to impede his access to the prison grievance system and that both the disciplinary report and removal of the items in his cell were retaliatory. As relief, plaintiff seeks monetary damages and injunctive relief to terminate the employment of defendants.

In their summary judgment motion, defendants present a much different version of the facts. Primarily, they point out that the reason plaintiff was sprayed with mace

was because he made continued verbal threats to staff despite being commanded to cease. According to defendants, plaintiff was screaming and kicking his cell door when Officer Owen first arrived at approximately 3:10 p.m. on the day in question. Plaintiff had also draped clothing or other material over both of his cell windows. After defendant initially refused to cease, Officer Bush arrived, and then a "cell extraction team" was summoned. Plaintiff was then given another opportunity to submit to being handcuffed before the team entered the cell and forcibly did so. Plaintiff complied, but defendants state that, while escorting him to the shower, plaintiff resumed his disruptive behavior. Bush then authorized Owen to use "pepper spray" on plaintiff while plaintiff was in the shower. Owen then administered a "one-second burst" of the spray, and when plaintiff did not cease, he sprayed another such burst. Doc. 10 at 4. Plaintiff then stopped being disruptive. Defendants state that plaintiff again became disruptive during the evening but calmed down before serious intervention was needed.

Defendants further state that plaintiff was seen in the medical department at 4:15 p.m., approximately one hour after the pepper spray was administered. As noted in the medical report attached to the motion, doc. 10, ex. G, plaintiff refused an eyewash, and no other treatment was administered. There were no presenting medical complaints or symptoms except that plaintiff stated his back was stinging. Defendants also point out that, before the

spray had been administered, they checked with the medical department to verify that there was nothing in plaintiffs medical record to suggest that he was sensitive to chemical agents.

Plaintiff was found to have violated the institutional rule against making verbal threats, resulting in a period of disciplinary confinement and the loss of gain time. Defendants point out that plaintiff refused to participate in the investigation and to attend the hearing. Thus, in defense of their actions, defendants assert that they responded to plaintiff because he was being disorderly and making threats, inciting other inmates in the process. Defendants further emphasize that plaintiff and the other inmates were under close management, which is reserved for inmates that have had difficulties in the open population because of their disruptive behavior.

In responding to the summary judgment motion, plaintiff argues that defendants' affidavits are "self-serving hearsay" and that the disciplinary report was fraudulent. He bases his argument, however, on the fact that the report did not mention the macing or that Officer Owen used profane, threatening language during the altercation. Importantly, plaintiff does not deny that he was being unruly and threatening. Plaintiff instead challenges defendants' assertions that they used a reasonable amount of mace.[1] Regarding the medical report, plaintiff

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[1] Defendants submitted a document entitled "Report of Force Used," which details the weight of the pepper spray can both before and after the incident. It may therefore be deduced that 0.7 ounces of the product was expelled during the incident. However, there is no expert analysis or other information in the

seems to indicate that he did not allow the nurse to treat his symptoms because he had decided to sue, but he does not explain why this decision would prevent him from accepting treatment. Plaintiff suggests that his back still hurts from the incident.

While acknowledging that they stripped plaintiffs cell, defendants also state that the mattress was returned to plaintiff on the following day as per standard institutional procedure. Although grievance records do not directly contradict this assertion, plaintiff nevertheless filed a grievance on the matter on November 14, 1995, two days after the incident, and he was therein informed to check with his "confinement officers," among which ostensibly would be defendants. Plaintiff states that he received this grievance response on November 15 and that he eventually received a mattress on November 20. However, plaintiff does not describe the steps he took to obtain a mattress after he received the response, nor does he state whether he addressed any request directly to defendants or any other staff member. Defendants also point out that plaintiff does not claim he was actually harmed from having slept without a mattress. Plaintiff does not counter this point.

Plaintiffs claim that defendants used excessive force against him falls under the Eighth Amendment proscription against cruel and unusual punishment. Such a claim requires a showing that defendants' actions amounted to

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record from which to ascertain how much or for how long the spray was actually applied. Plaintiff attempts to use this information to state that a large volume of the product was used upon him, but this effort is equally unavailing.

an "unnecessary and wanton infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986). The primary consideration is whether the "force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* at 320, 106 S.Ct. at 1085, (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)). Courts evaluate this "unnecessary and wanton infliction of pain" standard by considering the need for the application of the force, the relationship between this need and the actual amount of force used, the threat as reasonably perceived by the officials, and the extent of injury inflicted upon the prisoner. *Whitley*, 475 U.S. at 321; *Bennett v. Parker*, 898 F.2d 1530, 1533 (11th Cir. 1990); *Brown v. Smith*, 813 F.2d 1187, 1188 (11th Cir. 1987). Once the need for force abates, continued application of force may be violative. *Williams v. Burton*, 943 F.2d 1572 (11th Cir. 1991), *cert. denied*, 112 S.Ct. 3002, 120 L.Ed.2d 877 (1992). As explained in *Whitley*, the extent of injury factor may serve to indicate that "the use of force could plausibly have been thought necessary," or to indicate a "wantonness with respect to the unjustified infliction of har as m [sic] is tantamount to a knowing willingness that it occur." *Whitley*, 475 U.S. at 321; *see also Lunsford v. Bennett*, 17 F.3d 1574, 1582 (7th Cir. 1994). Additionally, in considering the extent of injury factor, conclusory allegations from the plaintiff about the seriousness of his injury should be discounted. *Brown*, 813 F.2d at 1188.

In evaluating all of the above factors, "the analysis must be informed by the wide ranging deference which is to be accorded prison administrators acting to preserve

discipline and institutional security." *Brown*, 813 F.2d at 1188; *see also Whitley*, 475 U.S. at 321. Thus, "a mere dispute over the reasonableness of a particular use of force" is insufficient to establish a violation. *Whitley*, 475 U.S. at 321; *Brown*, 813 F.2d at 1188-89; *see also Hines v. Boothe*, 841 F.2d 623, 624 (5th Cir. 1988) (distinguishing a malicious use of force from "merely careless or unwise excess of zeal").

The reasonable use of physical force in order to enforce compliance with institutional rules does not violate the Eighth Amendment. *Bennett*, 898 F.2d at 1533; *Ort v. White*, 813 F.2d 318, 324-325 (11th Cir. 1987). "Prison guards may use force when necessary to restore order and need not wait until disturbances reach dangerous proportions before responding." *Bennett*, 898 F.2d at 1533. Therefore, prison officials may judiciously use mace or other chemical agents "if a prisoner refuses after adequate warning to move from a cell or upon other provocation presenting a reasonable possibility that slight force will be required." *Ort*, 813 F.2d at 324; *see also Soto v. Dickey*, 744 F.2d 1260, 1270 (7th Cir. 1984), *cert. denied*, 470 U.S. 1085, 105 S.Ct. 1846, 85 L.Ed.2d 144 (1985). Officials may also take action when in their professional judgment the safety of the guards and the other inmates is placed in jeopardy. *Sims v. Mashburn*, 25 F.3d 980, 985 (11th Cir. 1994).

Defendants have shown that they responded to a genuine threat to institutional security and order and used what force was necessary to subdue plaintiff and

quell further disturbance from him or other inmates.[2] Plaintiff does not deny these assertions but simply questions whether the amount of spray used upon him was necessary. This dispute therefore involves only the reasonableness of the amount of force used and is no basis for a constitutional claim. That defendant Owen may have used derogatory or threatening language during the altercation is of little consequence. *See McFadden v. Lucas*, 713 F.2d 143, 146 (5th Cir. 1983); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987); *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979); *Glick*, 481 F.2d at 1033 n.7. Moreover, plaintiff's lack of injury and refusal of treatment indicates that a reasonable quantum of force was applied. Defendants' actions are entitled to deference, and it is therefore concluded that they did not violate plaintiff's Eighth Amendment rights in this manner.

Regarding the disciplinary report, such prison proceedings are not part of a criminal prosecution, and therefore the full panoply of due process rights that are due a defendant in a criminal proceeding does not apply. *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974).

In *Wolff*, the Supreme Court held that, in the prison context, due process requirements under the Constitution are satisfied if (1) written notice of the charges is given to the inmate at least twenty-four hours in advance in order to inform him of the charges and to enable him to marshal the facts and prepare a defense, (2) the inmate is

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[2] Defendants in fact mention that certain other inmates became disruptive during the incident with plaintiff and therefore had to be dealt with.

given the opportunity to call witnesses and present evidence when doing so would not unduly interfere with institutional safety or correctional goals, and (3) a written statement is drafted by the fact-finders as to the evidence relied on and the reasons for the disciplinary action. *Id.* at 563-67, 94 S.Ct. at 2978-80. The filing of false disciplinary charges against an inmate does not alone amount to a constitutional violation. *Sprouse v. Babcock,* 870 F.2d 450, 452 (8th Cir. 1989); *Freeman v. Rideout,* 808 F.2d 949, 951-53 (2d Cir. 1986), *cert. denied,* 485 U.S. 982 (1988). Because plaintiff makes only a conclusory allegation that he was falsely found in violation of institutional rules, he cannot sustain a due process claim.

Plaintiffs claim regarding the loss of his mattress is also an Eighth Amendment claim of cruel and unusual punishment. All claims challenging conditions of confinement must demonstrate an infliction of pain "without any penological purpose" or an "unquestioned and serious deprivation of basic human needs" such as medical care, exercise, food, warmth, clothing, shelter, or safety. *Rhodes v. Chapman,* 452 U.S. 337, 347, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981); *see also Hamm v. DeKalb County,* 774 F.2d 1567, 1571-72 (11th Cir. 1985), *cert. denied,* 475 U.S. 1096, 106 S.Ct. 1492, 89 L.Ed.2d 894 (1986). Furthermore, "conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Id.*

Additionally, it must be demonstrated that the defendants exhibited deliberate indifference to the needs of the prisoner in relation to his confinement conditions. *Wilson*

v. Seiter, 501 U.S. 294, 111 S.Ct. 2321, 2326-27, 115 L.Ed.2d 271 (1991). "Deliberate indifference" is a culpable state of mind of the defendant to unnecessarily and wantonly inflict pain or harm to a prisoner by depriving him of a basic human need. Negligence is not enough to violate the constitution. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986).

As it concerns appropriate bedding for inmates, whether courts have found actionable constitutional claims depends largely upon the facts of each individual case. In many of the instances wherein a violation was found, the deprivation of a mattress was but one among other deprivations to the inmate such as cold temperature, lack of clothing or blankets, lack of running water, and unsanitary conditions. *See, e.g., Kimbrough v. O'Neil*, 523 F.2d 1057 (7th Cir. 1975) (three days without mattress or blankets and no personal hygiene items resulted in violation); *McCray v. Burrell*, 516 F.2d 357, 367-69 (4th Cir. 1975) (two days without mattress, blankets or clothing in extremely cold cell, with no personal hygiene items; violation found); *Lee v. Carlson*, 645 F.Supp. 1430, 1436 (S.D.N.Y. 1986) (no mattress or blanket for two days may state claim), *aff'd*, 812 F.2d 712 (2d Cir. 1987); *O'Connor v. Keller*, 510 F.Supp. 1359, 1372 (D. Md. 1981) (two days without mattress or blanket states Eighth Amendment violation); *but see Sims*, 25 F.3d at 984 (expressing doubt that violation established after inmate spent 29 hours virtually naked in a "concrete box"); *Williams v. Delo*, 49 F.3d 442 (8th Cir. 1995) (four days without bedding, water, clothing, and hygienic supplies ruled not a violation); *Hernandez v. Denton*, 861 F.2d 1421, 1424 (9th Cir.

1988) (no mattress for one night; no violation), *vacated on other grounds*, 493 U.S. 801, 110 S.Ct. 37, 107 L.Ed.2d 7 (1989); *Morrison v. Martin*, 755 F.Supp. 683, 686 (E.D.N.C.) (occasional deprivation of mattress not a violation), *aff'd*, 917 F.2d 1302 (4th Cir. 1990); *Blackmon v. Derobertis*, 1989 U.S. Dist. LEXIS 3323 *11 (N.D. Ill. Mar. 24, 1989) (four-day deprivation of mattress not a violation).

As may be gleaned from the above holdings, the length of time in which the inmate is exposed to the condition is a factor to be considered. *See Hutto v. Finney*, 437 U.S. 678, 686-87, 98 S.Ct. 2565, 2571, 57 L.Ed.2d 522 (1978); *Sheley v. Dugger*, 833 F.2d 1420, 1429 (11th Cir. 1987). Equally as important is that the inmate suffer some identifiable harm from the conditions. *Chandler v. Baird*, 926 F.2d 1057, 1066 (11th Cir. 1991); *Brown v. Crawford*, 906 F.2d 667, 670 (11th Cir. 1990), *cert. denied*, 500 U.S. 933, 111 S.Ct. 2056, 114 L.Ed.2d 461 (1991). Additionally, in order to establish deliberate indifference by defendants, it must be shown that the inmate adequately notified defendants about the conditions. *Wilson*, 111 S.Ct. at 2326-27; *Seagrave v. Hennessey*, 19 F.3d 29, No. 92-17121, at *2 (9th Cir. Mar. 2, 1994) (Table, Text in Westlaw, No. 92-17121).

Although plaintiff alleges that he was without a mattress for eight days and that he filed a grievance on the matter, he does not trace the problem to any action or inaction of the defendants, and therefore no deliberate indifference can be established. Equally, because plaintiff does not even suggest that any harm befell him as a result, he does not establish constitutional injury. *Compare Chandler*, 926 F.2d at 1066 (sufficient harm established when inmate graphically described cold conditions in cell and being depressed as a result). Alternatively, it was not

clearly established law at the time of the incident that the lack of a mattress, standing alone, would be an actionable claim, especially without any resulting harm that was brought to the attention of the defendants. Accordingly, defendants are entitled to qualified immunity on this issue.[3]

Finally, plaintiff's allegation that defendants stripped his cell in retaliation against him or in order to thwart his efforts to use the prison grievance system is not actionable. Broad, conclusory allegations of retaliation are insufficient to state a claim under section 1983. *Goldsmith v. Mayor and City Council of Baltimore*, 987 F.2d 1064, 1071 (4th Cir. 1993); *Flittie v. Solem*, 827 F.2d 276, 281 (8th Cir. 1987); *Gill v. Mooney*, 824 F.2d 192, 194 (2d Cir. 1987). Plaintiff must come forth with "direct evidence" to establish retaliatory motive by prison officials who otherwise acted pursuant to institutional regulations. *Harris v. Ostrout*, 65 F.3d 912, 916-17 (11th Cir. 1995).

Upon consideration of the above, the court concludes that no genuine issue of material fact remains and that as a matter of law defendants are entitled to judgment in their favor.

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[3] Plaintiff also seeks injunctive relief, for which qualified immunity is no shield. However, the form of relief plaintiff seeks, termination of defendants' jobs, may not be gained in this court. It is beyond the authority of the court to consider this type of relief because the court would thereby become too "enmeshed in the minutiae of prison operations." *LaMarca v. Turner*, 995 F.2d 1526, 1543 (11th Cir. 1993) (quoting *Bell v. Wolfish*, 441 U.S. 520, 562, 99 S.Ct. 1861, 1886, 60 L.Ed.2d 447 (1974).

Accordingly, it is respectfully RECOMMENDED:

1. That defendants' motion for summary judgment (doc. 10) be GRANTED.

2. That judgment be entered by the Clerk in favor of defendants, and this cause be dismissed.

At Pensacola, Florida, this 8th day of May, 1997.

/s/ Miles Davis
MILES DAVIS
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

WILLIAM STEPHEN HALL,

Plaintiff,

vs. PCA 95-30539/LAC

L.W. OWEN and CAPTAIN BUSH,

Defendants.

_____/

ORDER

(Filed Jan. 22, 1996)

Plaintiff, an inmate proceeding pro se, has filed a civil rights complaint (doc. 1) under 42 U.S.C. § 1983 and an application for leave to proceed in forma pauperis. Subsequently, plaintiff submitted the filing fee and moved to annul the in forma pauperis application (doc. 4). However, plaintiff also filed a "Motion To Accomplish Service" (doc. 3) in which he seeks service of process via the court. In this limited instance, the court will grant plaintiff's motion insofar as it will order service of the complaint through appointee.

Accordingly, it is ORDERED:

1. Plaintiff's motion to annul the in forma pauperis application (doc. 4) is GRANTED, and the motion for leave to proceed in forma pauperis is hereby DENIED.

2. Plaintiff's "Motion To Accomplish Service" (doc. 3) is GRANTED as indicated herein.

3. The docket shall reflect that there are two (2) defendants in this action: L.W. Owen and Captain Bush. Plaintiff shall have ten days from the entry of this order on the docket in which to notify the court if this is incorrect.

4. The clerk shall issue summons, indicating that defendants have 60 days in which to file a responsive pleading, and refer the summons to the United States Marshal along with the service copies of the complaint.

5. Pursuant to Rule 4(c), Federal Rules of Civil Procedure, **W.G. Walker** is specially appointed to serve process upon the defendants at **Okaloosa Correctional Institution.**

6. Within 30 days from the date of entry of this order on the docket, the United States Marshal or a Deputy United States Marshal shall serve a copy of the **civil rights complaint and this order** upon defendants. Service shall be accomplished **by mailing these documents by regular mail to the above named special process server, who shall serve the complaint**. All costs of service shall be advanced by the United States.

7. Within 10 days after receipt of the complaint and this order, the server shall **serve the complaint upon the individuals named above, complete and sign** the return of service, and **return** it to the *clerk of court* as proof of service. The defendants shall also sign the return of service as an acknowledgment of receipt of service.

8. Within 10 days after receipt of the complaint and this order, if any of the defendants are no longer

employed at the Institution, the server shall report this information to the clerk of the court.

9. In accordance with 28 U.S.C. § 636(c)(2), the clerk shall forward to the plaintiff a form for consenting to trial by the magistrate judge, with the case number written on it. If plaintiff wishes to consent he should sign the form and forward it to counsel for defendants, who shall return it to the clerk only if defendants consent.

10. After a response to the complaint has been filed by the defendants, the plaintiff shall be required to mail to the attorney for each defendant a copy of every pleading or other paper, including letters, submitted for consideration by the court. The plaintiff shall include with the original paper to be filed with the clerk of the court a certificate stating the date a correct copy of the paper was mailed to each defendant or to the attorney representing each defendant. Any paper so submitted for filing that does not contain a certificate of service shall be returned by the clerk and disregarded by the court.

DONE AND ORDERED this 22nd day of January, 1996.

/s/ Susan M. Novotny
SUSAN M. NOVOTNY
UNITED STATES
MAGISTRATE JUDGE

FORM TO BE USED BY PRISONERS
IN FILING A COMPLAINT
UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. §1983

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF FLORIDA

William Stephen Hall

#122626

NO. 95-30539 LAC

(Enter above the full name of the plaintiff or plaintiffs in this action.)

COMPLAINT

V.

(Filed Nov. 29, 1995)

L.W. Owen

Captain Bush

(Enter above the full name of the defendant or defendants in this action.)

A. Have you begun other actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes (X) AN [sic] No (X)

B. If your answer to A is yes, describe the action in the spaces below. (If there is more than one action, describe the additional actions on the reverse side of this page.) Plaintiff sued "9" officers

1. Parties to the action: At Hamilton C.I. and sued "21" at Okaloosa C.I. "1" U.S. Dist. Ct. Middle Dist. of Fla. Tax. Div."

2. Court (if federal court, name the district; if state court, name the county): "2" U.S. Dist. Ct. Northern Dist. of Fla. Pensacola Div. "1" D.C. Dkt. No. 93-1174-Civ.-J-20-U.S.C.A. No. 94-2843

3. Docket number: "2" D.C. Dkt. No. 94-30274PCA-LAC-U.S.C.A. No. 95-2978 "1" U.S. Dist. J.-H.E. Schlesinger, and U.S. Magis. J.-J.E. Steele

4. Name of judge to whom case was assigned: "2" U.S. Dist. J.-Lacey A. Collier and U.S. Magis. J.-S.M. Novotny
"1" Seeking Certiorari by U.S. Supreme Ct.

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?): "2" Now on Appeal.

C. 1. Did you present the facts relating to your complaint in the state prison grievance procedure?

Yes (X) No ( )

2. If your answer is yes, what was the result? This suit concerns retaliatory discipline and thus no need to exhaust state remedies. Thus this suit is being filed before a response

3. If your answer is no, explain: _____

"This is an individual capacity suit."

PARTIES

(In item 1 below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

I. Name of plaintiff William Stephen Hall #122626

Address Okaloosa Correctional Institution, 3189 Little Silver Road, Crestview, Florida 32536

(In item II below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use the space below item II for the names, positions, and places of employment of any additional defendants.)

II. Defendant L.W. Owen is employed as Sargent Correctional Officer at Okaloosa Correctional Institution

DEFENDANT: Captain Bush is employed as Captain Correctional Officer at Okaloosa Correctional Institution 3189 Little Silver Road, Crestview, Florida 32536

STATEMENT OF CLAIM

III. State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of different claims, number and set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheet if necessary.)

The joint tortfeasor's in this complaint are in violation of the 1st, 5th, 8th, and 14th, Amendments of the U.S. Constitution. Thus on Nov. 12-1995, plaintiff was removed from his C.M.C.M. cell by Sgt. L.W. Owen by order of Cpt. Bush in restraints with my hands cuffed behind my back, and I was wearing no clothing other than my boxer shorts, and then C.O.1, Owen placed me in the shower, and sprayed mace

gas in my eyes and all over my body for about "8" to "9" seconds. Thus I all most chocked to death, and I was blind for about "25" minutes. Thus this unnecessary and wanton infliction of pain and deadly chemical assault was done maliciously and sadistically with intent to do me serious bodily injury. This excessive force by Owen and Bush was done in bad faith, because I was neither a threat to the staff or inmates. Thus Owen and Bush remove me from my cell and strip me of everything in my cell including my mattress and maced me for requesting COl, Owen turn the heat on, and turn the draw fan off. Thus this artifice, and bad faith tactics of striping my cell to prevent me from filing an emergency grievance concerning this excessive and deadly use of chemical force and wrongful deprivation of my clothing, legal work and beding [sic] was retaliation by Sgt. Owen and Cpt. Bush, for my verbal grievance. Thus I was forced to sleep on a cold steel bunk and the concret [sic] floor without a mattress or blanket or linen or cloths for about "35" hours. Thus my legal work and clothing was return to me, but my mattress, blankets and linen has not been return as of Nov. 18-1995, thus "8" days. Thus Sgt. Owen wrote a fraudulent disciplinary report or "DR" and did not mention in the "DR" that he maced me or used chemical agents on me, also COl, Owen did not mention that Cpt. Bush was called or mention who authorized the fraudulent "DR" to be written, on Nov. 12-1995. Thus Sgt. Owen has threaten me in the fraudulent "DR" by artifice stating "quote" I'll kill you. Do you hear me mother fucker? I'm going to kill you. You don't belong down here, I'm going to kill you. Thus, this psychological ploy designed to terrorize an threaten inmates is used by certain officers when they write fraudulent disciplinary reports with intent to deceive the reader and threaten the

inmate by artifice. Thus Cpt. Bush did not come to my cell to see or hear what the problem was before authorizing COl, Sgt. Owen to remove me from my cell. Thus Cpt. Bush was called after COl, Owen attempted to remove me from my cell and take my beding [sic] and all my property outside of supervision of higher authority. Thus Cpt. Bush was present physically when I was maced in restraints in the shower by COl, Owen. Thus Cpt. Bush did not investigate, before authorizing the wrongful deprivation of my personal property and beding [sic]. Thus Cpt. Bush refused to say any thing to me at the shower before I was maced and when Cpt. Bush came to my cell after I was examined by L.P.N. nurse Turner whom I am sueing [sic] also, Cpt. Bush refused to talk to me and told me to get on my bear [sic] steel bunk or I would be maced again. Thus this Corporal Punishment inflicted upon my body amounts to aggravated assault committed with a dangerous or deadly weapon with conscious disregard and wanton indifference to the consequences of this outrageously wicked and insensitive brutality performed under color of state law by the two perpetrators and joint tortfeasors mention supra in this bona fide civil action. Thus Owen and Bush have by concerted action attempt to conceal this matter.

RELIEF

IV. State what relief you seek from the court. Make no legal arguments. Cite no cases or statutes.

Plaintiff request damages for mental anguish and pain and suffering in the amount of "5" million dollars. Also punitive damages. Thus the two "2" defendants are psychopathic disordered, and, sadists and both are maniacs and thus I request there [sic]

employment by the Dept. of Corrections be terminated for abuse and misuse of a position of public trust under color of state law.

Signed this 19th day of November 1995.

/s/ William S. Hall #122626

(*Signature of plaintiff or plaintiffs*)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Nov. 19th 1995
(*date*)

/s/ William S. Hall #122626
(*Signature of Movant*)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

WILLIAM STEPHEN HALL

Plaintiff

V. CASE NO. 95-30539/LAC.

L.W. OWEN, Et Al.,

Defendants

MEMORANDUM OF LAW

This is plaintiff's argument in support of his position in a separate memorandum of law.

Pro Se /s/ William S. Hall #122626

William Stephen Hall
Okaloosa Correctional Inst.
3189 Little Silver Road
Crestview, Florida 32536

Corporal punishment is punishment inflicted upon the body such as Whipping. 69 F.2d 905. Whipping has been found to violate contemporary standards of civilized conduct, and thus to be prohibited by the 8th Amendment's ban on "cruel and unusual punishment," whether administered pursuant to a sentence or in the course of prison discipline. 404 F.2d 571. Thus the chemical agent mace was sprayed in plaintiff eyes and all over plaintiff body which caused severe respiratory problems and pain, also plaintiff had fight for his life by taking very very short breaths in order to prevent suffocation and posible [sic] death because plaintiff hands were cuffed behind his back and thus plaintiff was unable to cover his face, nose and mouth to diminish and negate the force and effects of the mace gas. Thus plaintiff was temporaryly [sic] blind for "25" minutes, "eyes, skin and body burning. Thus plaintiff was then put back in his cold cell with no cloths [sic] on for about "35" hours and was no beding [sic], mattress, blankets, linen and pillow for 9 or more days. Thus this was physical and mental torture. Thus in" Tison v. Arizona, the supreme court upheld the constitutionality of the death penalty for those who, although not intending that a killing take place, exhibit a "reckless disregard for human life. The beatings, physical abuse, "torture", running of gauntlets, and similar cruelty was wholly beyond any force needed to maintain order in a prison" and thus constituted cruel and unusual punishment. *"See" Buckner v. Hollins,* 983 F.2d 119, 123 "8th Cir. 1993" Eighth Amendment claim stated when state correction's officer failed to stop assault by county correction's officer on naked, handcuffed inmate in cell. Thus in the instant case at bar, no officer or Cpt. Bush intervened or

stoped [sic] Sgt. Owen from spraying mace in my eyes and all over my naked body while handcuffed with my hands behind my back in a 4' by 6' shower cell. *"See" McLaurin v. Prater,* 30 F.3d 982, 984 "8th Cir. 1994" Eighth Amendment violated when security officer struck inmate with sole purpose to hurt inmate. Thus in the instant case at bar, plaintiff was unreasonablely [sic] and unnecessaryly [sic] maced, and thus maliciously and sadistically for the purpose of causing harm and pain. *"See" Wildberger v. Bracknell,* 869 F.2d 1467, 1468 "11th Cir. 1989" Per Curiam" First Amendment implicated when prisoner alleged that placed in disciplinary segregation in retaliation for filing grievances. Thus in the instant case sub judice plaintiff was maced and strip of everything in plaintiff cell for reasons of plaintiff verbal and spoken grievance to COl, Sgt. L.W. Owen concerning turning the heat on and turning the draw fan off. Thus the failure to provide detainees with mattress and bed or bunks violates due process and 8th Amendment. *"See" Lareau v. Manson,* 651 F.2d 96, 105 "2d Cir. 1981" prisons use of floor mattresses for pretrial detainees unconstitutional regardless of length of use by detainee. *"See" Thompson v. City of Los Angeles,* 885 F.2d 1439, 1448 "9th Cir. 1989" County Jail's failure to provide pretrial detainee with bed or mattress violated due process. Thus in the instant case at bar plaintiff was forced to sleep in a cold cell on a cold steel bunk and on the concret [sic] floor without a mattress or blanket, or linen, or cloths [sic] for about "35" hours, and then plaintiff personal property was return, but plaintiff mattress, blankets and linen was not returned, and thus plaintiff was without beding [sic] for "9" or more days, and thus more corporal punishment

inflicted upon plaintiff person for the purpose of harassment. Thus in "*Hudson v. McMillian,* 112 S.Ct. 995 "1992" prison guards struck the inmate in the face, chest and abdomen while he was in full restraint and being transfered [sic] to an administrative lockdown cell, causing minor bruises, a swollen face, and a broken dental plate. *Id.* at 997. "The supreme court noted that the "8th" Eighth Amendment is necessarily contextual and responsive to "contemporary standards of decency" *Id.* at 1000. Therefore, even though extreme deprivations are required to sustain a "conditions of confinement claim" and medical needs must be serious to make out a deliberate indifference claim, the "malicious and sadistic" use of force may breach constitutional limitations even if no significant injury is alleged. *Id.* Thus on all fours in the instant case sub judice; plaintiff was assaulted maliciously and sadistically with deadly chemical force which caused severe respiratory problem, pain and burning, also temporary bliness [sic] and severe pain, and thus torture. Thus death by suffocation by mace gas is a horrible way to die. "*See*" *Burton v. Livingston,* 791 F.2d 97, 100 "8th Cir. 1986" liberty interest in freedom from terror of instant and unexpected death. Thus without warning COl, Sgt. ran to the shower spaying [sic] the chemical agent mace, Sgt. L.W. Owen conspired with captain bush to assault plaintiff without warning, in a dangerous and deadly manner, and thus the mace became a deadly weapon in the hands of Sgt. L.W. Owen because of the way it was and the force used. Thus in "*Tison v. Arizona,* 481 U.S. 137 "1987" "*Tison,* 481 U.S. at 154. The court noted that, dispite [sic] *Enmund,* "21" states still authorized the death penalty for felony murderers who were major actors in a

crime in which they knew a death was likely to occur. "*Tison*," 481 U.S. at 152-54. The majority found that this substantial and recent legislative authorization – powerfully suggest that our society does not reject the death penalty as grossly excessive under these circumstances." *Id.* at 154. In dissent, Justice Brennan emphasized that "approximately three-fifth's of American Jurisdictions do not authorize the death penalty for a non-triggerman," absent a finding that he intended to kill. Thus in the instant case sub judice both COl, Sgt. L.W. Owen and Captain Bush conspired to inflict this deadly and life threatening assault without warning with the chemical agent mace with intent to inflict serious and severe unnecessary wanton pain upon plaintiff with wanton disregard and deliberate indifference to plaintiff's health and safety. Thus if any inmate is killed by this premeditated device imployed [sic] by Sgt. L.W. Owen and Captain Bush, they both should be arrested and charged with conspiracy to commit fist [sic] degree murder, and thus placed on trial and if found guilty, both "Owen" and "Bush" should be sentenced and put to death in Florida's electric chair. Thus animal cruelty laws protect domestic and wild animals and private or personal pets from inhumane and outrageously wicked treatment. Thus e.g. if someone walks through a neighborhood and while doing so, assaults all the harmless restrain pets behind a fence or on a chain with mace gas, that person can be arrested for animal cruelty and also sued in civil court. Thus because a person is in prison, does not make that person less than an animal and thus void of laws concerning cruelty. *"See" Monell v. Department of Social Serv.*, 436 U.S.

658 "1978", the court held that misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of state law." 313 U.S. at 326. Thus *"see" Parratt v. Taylor,* 451 U.S. 527, 535 "1981" prison official considered state actor under 1983. Thus this malice aforethought by the joint tortfeasors "Owens" and "Bush" was done under color of state law. Thus *"see"* 3A1.1, defendant selected the victim as a target because of the victim's vulnerability, the base offense level is incersed [sic] two levels. *"See" U.S. v. Hershkowitz,* 968 F.2d 1503, 1505 "2d Cir. 1992" 3A1.1 applied when victim surrounded by guards and assaulted by one guard. Thus in the instant case sub judice, plaintiff was restrain with handcuffs and inside a locked "4' by 6'" shower cell, and surrounded by Sgt. L.W. Owen and "3" to "6" others, and assaulted by "Owen". *"See" Davis v. Scherer,* 468 U.S. 183, 197 "1984" plaintiff can only overcome qualified immunity by showing that rights clearly established at time of violation. Thus review the supra case law which abrogates any thought of qualified immunity for the joint tortfeasors. *"See" Bressman v. Farrier,* 900 F.2d 1305, 1307 "8th Cir. 1990" prisoners need not exhaust state remedies when challenging conditions of confinement and retaliatory discipline," *cert. denied,* 111 S.Ct. 1090 "1991".